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JUL 9 1957
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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. ~~1078~~ 183

TOMMASO ARGENTO,
Petitioner,

vs.

HERBERT A. HORN,
United States Commissioner,
XAVIER NORTH,
United States Marshal,
DR. FOLCO ZUGARO,
Consul for the Republic of Italy,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENT, DR. FOLCO ZUGARO, CONSUL FOR THE REPUBLIC OF ITALY, IN OPPOSITION.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED.

The first three questions posed by the Petitioner may be restated more fairly as our question No. 1 and the last four questions posed by the Petitioner may be restated more briefly as our question No. 2.

1. Did both the United States Court of Appeals and the District Court err in holding the Commissioner justified in finding that the accused before him was the Tommaso Argento named in the extradition warrant when such finding was based on:

(a) A complete record of the accused before the Italian Courts properly authenticated as provided by law containing a description of the accused and his pedigree; (b) Upon a photograph of the accused (Exhibit F) to which were attached physically, prop-

erly authenticated affidavits of three persons who lived in the same Italian town as the accused, and who swore in substance that the subject of the photograph was Tommaso Argento, son of Salvatore, who had been convicted of the murder of Giovanni Camilleri; (c) Upon a fingerprint record taken of the accused by the United States Marshal; (d) Upon an Alien Registration Form of 1940 bearing Tommaso Argento's fingerprints, his description, and pedigree; (e) Upon an Application for Certificate of Identification executed by Tommaso Argento, son of Salvatore, on February 27, 1952 which bore his fingerprint, his photograph, his description, and his pedigree; (f) Upon the testimony of an expert from the Scientific Identification Bureau of the Cleveland Police Department who testified that the fingerprint of the right index finger made by Tommaso Argento on the Alien Registration Form of 1940 was identical to the fingerprint of the accused taken by the Marshal and identical to the fingerprint impressed on the Application for Certificate of Identification executed by Tommaso Argento, son of Salvatore, in February 1942 and who further testified that the photograph which was affixed to said Application for Certificate of Identification was of the same person as the photograph (Exhibit F) identified by the affidavits of the three witnesses from Italy who had identified the subject of the latter photograph as Tommaso Argento, son of Salvatore, who had been convicted of murder; (g) Upon the testimony of Dr. Folco Zugaro, former Professor of Law at the University of Rome, who testified as an expert that the affidavits of the three witnesses aforementioned attached to the photograph

aforementioned were authenticated in such form as to be admissible in evidence in a similar extradition proceeding in Italy and that the photograph itself as authenticated would likewise be admissible in evidence in a similar proceeding and who testified further that hearsay evidence is admissible in evidence under Italian jurisprudence in the trial of criminal and extradition matters?

2. Was the Extradition Treaty of 1868 between the United States and Italy in force at the time of Petitioner's arrest?

ADDITIONAL STATUTE INVOLVED.

18 U. S. C. A., Title 18, Sec. 3190: Evidence on Hearing.

Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required. June 25, 1948, c. 645, Stat. 824.

COUNTER-STATEMENT OF FACTS.

Appellant's statement of facts is correct in part but insufficient in the respects following:

In 1931 in a trial in Italy, eleven persons were tried for the murder of Giovanni Camilleri. Only two of them bore the name of Tommaso Argento, but the entire record of the trial proceedings in Italy with accompanying English translation, all duly authenticated by the United States Consular Office, as provided by Section 3190, Title 18, U. S. C. A. and the treaty was introduced into evidence before the Commissioner. That transcript distinguishes the two Tommaso Argentos from each other by setting forth their pedigrees. What is more! Both were found guilty. The first of murder, the second of complicity in the murder.

After his arrest on April 5, 1955, Tommaso Argento filed a petition for a writ of Habeas Corpus in the District Court. The Honorable Connell, J., denied the application for Writ on May 26, 1955, holding among other things that the Extradition Treaty of 1868, as amended, was still in force.

No appeal was ever taken from that decision.

The extradition hearing before Commissioner Horn resumed June 21, 1955, and was completed on July 11, 1955. At that hearing, the entire transcript of the trial in Italy of Tommaso Argento was introduced into evidence. It included a certified copy of the charge, the warrant of arrest, the record of the conviction for murder, the sentence, copies of the applicable Penal Code and the entire record of the evidence and trial before the Court (Joint Exhibit C).

The appointment of Dr. Folco Zugaro as Consul for Italy (Joint Exhibit A); The certificate signed by the

Secretary of State attesting to the requisition for extradition made by the Republic of Italy (Joint Exhibit B); A copy of the Appellant's petition for a Writ of Habeas Corpus and Judge Connell's decision relating thereto (Joint Exhibits D and E) likewise were all put into evidence.

The first witness called by the Appellees before the Commissioner, was Dr. Folco Zugaro, who testified: that he was Consul for the Republic of Italy with jurisdiction in the State of Ohio and in the State of Kentucky; that he held a degree in law from the University of Rome conferred in 1935 and a degree in political sciences conferred in 1937; that he was admitted to the practice of law in Italy and that as an assistant professor for seven years he taught law at the University of Rome for four years.

He testified that Joint Exhibit C (a complete record of the trial of the accused before the Italian Courts) was admissible as evidence in a trial in Italy under the laws of Italy and that each component part of the record, the charge, the record of conviction, the sentence and every part of Joint Exhibit C would be admissible in a criminal trial under the laws of Italy.

He further stated that affidavits of witnesses of the crime for which extradition was sought would be admissible in evidence in Italy in an extradition hearing; that the writing on the back of Joint Exhibit F (photograph of accused) was in Italian and that Joint Exhibit G constituted a correct and accurate translation into English of said writing; that Exhibit F under Italian law would be admissible into evidence in the trial of a criminal case; that physically attached to said Exhibit F were sworn statements of persons living in Ioppolo Giancaxio, Agrigento who had known the accused; that they were authenticated in such manner as to be admissible in evidence in

Italy in a criminal trial, and in a similar kind of extradition proceeding. He then translated the statements physically attached to Joint Exhibit F which were made by Onofrio Sacco, Giuseppe Camilleri, and by Antonino Sacco. All of said statements in substance stated that each of said persons personally knew Tommaso Argento, son of Salvatore, born in Ioppolo Giancaxio, who was convicted in absentia and sentenced to life imprisonment by the Court of Assize of Agrigento for the premeditated murder of Giovanni Camilleri and having seen the photograph (Joint Exhibit F) to which said statement was attached, he, the deponent, recognized the subject of said photograph to be Tommaso Argento, son of Salvatore (17b).

He further testified that hearsay evidence is admissible in a trial of criminal matters in Italian courts, and that unsworn statements of witnesses in writing is likewise admissible in evidence in a criminal trial in Italy.

Joseph M. Hovancsek testified that he was a deputy United States Marshal; that he had brought the accused to court that morning; that he had taken the finger-prints of the accused that morning and that those finger-prints were reflected in Joint Exhibit I.

The witness Max H. Watkins testified that he was employed by the United States Immigration & Naturalization Service since 1937; that he had brought with him the official file of the United States Immigration & Naturalization Service relating to Tommaso Argento to the hearing. That the official file contained Alien Registration Forms relating to Tommaso Argento; that the file was assigned to him; that Joint Exhibit J was the Alien Registration Form signed by Tommaso Argento executed in 1940 at the time the Alien Registration Act went into effect; that Joint Ex-

hibits K-K1 were the Alien Registration Forms signed by Tommaso Argento executed in 1942; that Joint Exhibit K had attached a signed photograph of Tommaso Argento; that Joint Exhibits J & K contained fingerprints of the right index finger of Tommaso Argento; that Joint Exhibit K indicated the accused, Tommaso Argento, had entered the United States under the name of Giovanni Camilleri; that he was born in or near Ioppolo, Province of Agrigento, Italy; that he was a subject of Italy; that he was a male, married member of the white race, 5'5" in height, weighing 250 lbs., with brown hair and blue eyes; that Joint Exhibit K reflected that Tommaso Argento had a father, Salvatore Argento and a mother Carmella living in Ioppolo, Italy; as well as a wife, son, and brothers and sisters; that he was 5'6" high with blue eyes and gray hair.

The last witness before the United States Commissioner was James A. Benasek who testified that he had been a member of the Cleveland Police Department since April 1, 1928, and that he was attached to the Scientific Identification Bureau of the force since April 1, 1929; that the bureau concerns itself with finger-prints and photographs of individuals; that in that period of time he probably had compared 20,000 to 30,000 fingerprints never finding two alike; that the fingerprint of the right index finger appearing on Joint Exhibit I was made by the same individual who made the fingerprints on Joint Exhibit J and on Joint Exhibit K; and that the individual pictured on Joint Exhibit K was the same individual pictured on Joint Exhibit F (photo).

Contrary to petitioner's statement, Exhibits G1, G2, G3, H1, H2 and H3 were all sworn statements, made before an Italian police official who, under the Italian System,

is a police official and at the same time an inquiring officer of the Court in whose territory he operates.

Despite the assertion by petitioner that Exhibits J, K and K1 (Alien Registration Records) were made available without authorization by the Attorney-General, the fact is that the record is silent on that point and, therefore, the presumption obtains that the Attorney-General did authorize their use.

ARGUMENT.

(1)

The record is indeed silent as to why Tommaso Argento was not brought to trial before 1931. The record is equally silent as to whether or not he continued to live in Ippolo Giancaxio, Sicily, where the murder was committed. Tommaso Argento did not testify and since conjecture and speculation are in order, we prefer to think that Tommaso Argento went into hiding, particularly since he used the victim's name as his own in securing a passport with which to leave Italy.

To accuse the great Republic of Italy of political skulduggery, revenge and vendettas because it is attempting to preserve law and order within its borders by bringing a wanted criminal to book, to accuse Italy of high-handed and improper conduct in attempting to extradite a murderer by means which a United States District Court and United States Court of Appeals have ruled legal, is, to say the least, the basest sort of legal chicanery. We shall not dignify it with any further answer. The Counter-Statement of Facts discloses proof of an abundance of facts to permit the Commissioner to exercise his legal discretion and to conclude that the accused before him was the person who was named in the warrant of extradition, *particu-*

larly since Petitioner never took the stand to deny that he was.

This question of fact has been passed on by the District Court of the United States for the Northern District of Ohio and by the United States Court of Appeals for the Sixth Circuit and in each instance said Courts have upheld the finding of the Commissioner.

No real reason upon which to predicate a petition for writ of certiorari is presented.

(2)

The treaty of 1868 was not terminated by World War II.

Mr. Justice Washington, delivering the opinion of the Supreme Court, in the case of *Society for Propagation of the Gospel v. New Haven*, 8 Wheat. (U. S.) 464, 5 L. ed. 662, at page 494 of the opinion, stated:

> "But *we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, ipso facto, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace.* Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms in relation to this subject, *we are satisfied that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to th , but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war.* If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged

our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning.

We think, therefore, that treaties stipulating permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace * * *." (Emphasis ours.)

The above case has been approved and followed in *Clarke, v. Allen*, 331 U. S. 503, 91 L. ed. 1633, 67 S. Ct. 1431, 170 A. L. R. 953, decided June 9, 1947. In the latter case, Mr. Justice Douglas, delivering the opinion of the Court, at page 508, wrote:

"* * * *We start from the premise that the outbreak of war does not necessarily suspend or abrogate treaty provisions.* Society for Propagation of Gospel v. New Haven, 8 Wheat. (U. S.) 464, 494, 495, 5 L. ed. 662, 669, 670. *There may of course be such an incompatibility between a particular treaty provision and the maintenance of a state of war* as to make clear that it should not be enforced. Karnuth v. United States, 279 U. S. 231, 73 L. ed. 677, 49 S. Ct. 274. Or the Chief Executive or the Congress may have formulated a national policy quite inconsistent with the enforcement of a treaty in whole or in part. This was the view stated in Techt v. Hughes, 229 N. Y. 222, 128 N. E. 185, 11 ALR 166, supra, and we believe it to be the correct one. That case concerned the right of a resident alien enemy to inherit real property in New York. Under New York law, as it then stood, an alien enemy had no such right. The question was

whether the right was granted by a reciprocal inheritance provision in a treaty with Austria which was couched in terms practically identical with those we have here. The court found nothing incompatible with national policy in permitting the resident alien enemy to have the right of inheritance granted by the treaty. Cardozo, J., speaking for the court, stated the applicable principles as follows:

'The question is not what states *may* do after war has supervened, and this without breach of their duty as members of the society of nations. The question is what courts are to presume that they have done * * * President and senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts (Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 S. Ct. 1016). *The treaty of peace itself may set up new relations, and terminate earlier compacts either tacitly or expressly.* * * *' "

In *Karnuth v. U. S.*, 279 U. S. 231, 73 L. ed. 677, decided April 8, 1929, wherein the Supreme Court held that Article III of the Jay Treaty of 1794 with Great Britain, permitting subjects of the respective countries to pass and re-pass through the borders, was abrogated by the War of 1812, Mr. Chief Justice Sutherland, delivering the opinion of the Court, at page 240, wrote the following significant language:

"* * * Westlake classifies treaties not affected by war as (1) those providing what is to be done in a state of war, (2) transitory or dispositive treaties, including such as are intended to establish a permanent condition of things, such as treaties of cession, boundary, and recognition of independence, *as well as those having no conceivable connection with the causes of war or peace*, and (3) treaties establishing arrangements to which third powers are parties, such as

guaranties and postal and other unions. Westlake, International Law, part II, pp. 29-32 * * *." (Emphasis ours.)

The treaty here considered falls within one of those classifications and, thus, would not be deemed to have been abrogated by the outbreak of war, but at most only suspended.

Our conclusion, therefore, is that the greater weight of authority holds that war does not *ipso facto* terminate a treaty, and that the type of treaty here considered, is at most only suspended by the outbreak of war.

Moreover, it might be well to point out that the language contained in Article 44 of the Peace Treaty of 1947, *is, itself, contained in a treaty which was in fact ratified by the Senate.* That language leads to the inescapable conclusion that so far as the Executive of the Government and the Senate were concerned, all bilateral treaties theretofore existing between Italy and the United States, were then deemed to be in full force, and would, thereafter, continue in full force beyond the time limit of six months, upon specific designation of the particular treaties desired by the United States.

In any event, the very least that can be said for the language is that upon designation by the Executive Branch of the Government, all treaties theretofore ratified were deemed to have been re-ratified in advance, and the provision for deeming abrogated those treaties which were not designated to be kept in existence, leads to the inference that the Senate considered all of said treaties in force and in existence until the six months had expired.

Even if that construction of the language be rejected, there was a manifest delegation by the Senate to the Executive Department, to determine which of previously

existing treaties should be deemed to continue in existence. Such a practice has been followed by almost every Congress of the United States, since the existence of our country, and has been held to be a constitutional practice.

Lichter v. U. S., 334 U. S. 742, 92 L. ed. 1694, decided June 14, 1948, dealt with the objection that the War Contracts Renegotiation Act unconstitutionally delegated legislative power to the Undersecretary of War or the War Contracts Price Adjustment Board. The fourth syllabus of that case reads:

> "4. A constitutional power implies a power of delegation of authority under it sufficient to effect its purposes."

In *Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U. S. 103, 92 L. ed. 568, the following language from the opinion of the Court, by Mr. Justice Jackson, page 109, is illuminating:

> "* * * Congress may of course delegate very large grants of its power over foreign commerce to the President. Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 77 L. ed. 796, 53 S. Ct. 350; United States v. George S. Bush & Co., 310 U. S. 371, 84 L. ed. 1259, 60 S. Ct. 944. The President also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs. For present purposes, the order draws vitality from either or both sources. Legislative and Executive powers are pooled obviously to the end that commercial strategic and diplomatic interests of the country may be coordinated and advanced without collision or deadlock between agencies. These considerations seem controlling on the question whether the Board's action on overseas and foreign air transportation ap-

plications by citizens are subject to revision or overthrow by the courts. * * *"

To the same effect, is *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 81 L. ed. 255, decided December 21, 1936. The seventh syllabus of that case reads:

"7. *A uniform, long-continued, and undisputed legislative practice, resting upon an admissible view of the Constitution, goes a long way in the direction of proving the presence of unassailable grounds* for the constitutionality of the practice." (Emphasis ours.)

Moreover the State Department by letter of February 6, 1948 notified Italy that it desired to keep said extradition treaty in force. The United States Senate had approved said treaty originally; World War II made it physically impossible for its continuity but war had no intrinsic incompatibility towards the relationship itself.

The United States Senate left it to the State Department to make the decision as to when the relationship should be resumed, revived and kept in force since with the end of the war, the physical reason for its discontinuance had ended. That decision of the political department of the United States Government is entitled to the court's every consideration and the Supreme Court so stated in the case of *Charlton v. Kelly, Sheriff of Hudson County, New Jersey*, 229 U. S. 447, to the following effect:

"The construction of a treaty by the political department of the Government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is of great weight."

In *Terlinden v. Ames*, 184 U. S. 270, 46 L. ed. 534, decided February 24, 1902, involving the question of a treaty of extradition similar to the one here involved held:

"The existence of the treaty of June 16, 1852, between the United States and Prussia, which has been repeatedly recognized by both governments as still in force, notwithstanding the incorporation of Prussia into the German Empire, cannot be questioned by the judicial department in proceedings for a writ of habeas corpus to prevent the extradition of a fugitive from Prussia who is held under extradition proceedings under that treaty, as the question is a political one, and the courts must accept the determination thereof by the political department of the government."

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 8, 1957.